

WISCONSIN SUPREME COURT CALENDAR AND CASE SYNOPSES APRIL 2014

The cases listed below will be heard in the Wisconsin Supreme Court Hearing Room, 231 East, State Capitol. This calendar includes cases that originated in the following counties:

Brown
Milwaukee
Racine
Rock
Waupaca

THURSDAY, APRIL 3, 2014

9:45 a.m.	12AP55	-	State v. Andres Romero-Georgana
10:45 a.m.	12AP378-W	-	Lorenzo D. Kyles v. William Pollard
1:30 p.m.	12AP393-CR	-	State v. Cortez Lorenzo Toliver

TUESDAY, APRIL 8, 2014

9:45 a.m.	11AP1467-CR	-	State v. Donyil L. Anderson, Sr.
10:45 a.m.	12AP46-CR	-	State v. Jimothy A. Jenkins

WEDNESDAY, APRIL 9, 2014

9:45 a.m.	12AP2513-CR	-	State v. Raphfeal Lyfold Myrick
10:45 a.m.	12AP1949-D	-	Office of Lawyer Regulation v. Michael G. Trewin

The Supreme Court calendar may change between the time you receive these synopses and when the cases are heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at 608-266-1880. That office will also have the names of the attorneys who will be arguing the cases.

Media interested in providing camera coverage, must make requests 72 hours in advance by calling media coordinator Rick Blum at (608) 271-4321. Summaries provided are not complete analyses of the issues presented.

(Rev. 4.4.14)

WISCONSIN SUPREME COURT
THURSDAY, APRIL 3, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed a Brown County Circuit Court decision, Judge Kendall M. Kelley, presiding.

2012AP55

[State v. Andres Romero-Georgana](#)

This sexual assault case involves a defendant's claim that his postconviction counsel provided ineffective assistance by challenging the circuit court's sentencing decision rather than raising a plea withdrawal claim based on the circuit court's failure to orally advise the defendant of the deportation consequences of his no-contest plea, as required by Wis. Stat. § 974.08(1)(c).

Some background: Romero-Georgana was convicted on a no-contest plea of sexual assault of a six-year-old girl. The plea forms, which were provided in English and Spanish, notified Romero-Georgana that if he is not a citizen of the United States, his plea could result in deportation, the exclusion of admission to this country, or the denial of naturalization under federal law. However, the court did not orally advise Romero-Georgana of the deportation consequences of his no-contest plea as required by Wis. Stat. § 974.08(1)(c). The court accepted the plea and sentenced Romero-Georgana to 12 years' initial confinement and four years' extended supervision.

In Romero-Georgana's first post-conviction proceedings, he was represented by Atty. Suzanne Hagopian. She argued the sentencing court failed to consider the sentencing guidelines as required by State v. Grady, 2007 WI 81, ¶44, 302 Wis. 2d 80, 734 N.W.2d 364. The Court of Appeals reversed the judgment and remanded the matter for resentencing. After substitution of judge, the trial court imposed a sentence of 20 years' initial confinement and eight years' extended supervision.

In Romero-Georgana's second post-conviction proceedings, he was represented by Atty. Tajara Dommershausen, who filed a post-conviction motion alleging ineffective assistance of counsel based on the request to substitute judge.

The circuit court denied the motion and Dommershausen filed a no-merit report. The Court of Appeals limited the review to issues arising out of the resentencing hearing, specifically disallowing issues relating to the initial plea hearing, and summarily affirmed the judgment. The Supreme Court previously denied review of that decision.

Romero-Georgana brought the post-conviction motion at issue here, arguing ineffective assistance of his trial and post-conviction counsel. The trial court denied the motion without a hearing.

Romero-Georgana appealed, unsuccessfully. The Court of Appeals noted that Romero-Georgana failed to establish that the deportation issue would have been stronger than the issue that Hagopian actually presented, which resulted in reversal of the judgment of conviction and a remand for resentencing. The Court of Appeals also noted that Romero-Georgana failed to explain why he would have given up a favorable plea agreement and risked additional charges to take his chances at trial had he been properly advised about the possibility of deportation.

WISCONSIN SUPREME COURT
THURSDAY, APRIL 3, 2014
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judge Richard M. Sankovitz, presiding.

2012AP378-W

Kyles v. Pollard

This case examines the appropriate procedure for a defendant to follow when challenging trial counsel's alleged failure to file a notice of intent to pursue post-conviction relief. The notice of intent is the first step in bringing a direct appeal challenging a conviction or sentence.

Some background: In 2002, Lorenzo D. Kyles pled guilty to first-degree reckless homicide with use of a dangerous weapon. He was sentenced in November 2002 to 32 years of initial confinement and eight years of extended supervision.

Kyles had no direct appeal because no notice of intent to pursue post-conviction relief was filed on his behalf. Why that document was never filed is a matter of some dispute. Kyles claims he tried to contact his attorney in the 20-day period following his sentencing to ask him to file a notice of intent to pursue post-conviction relief as required under Wis. Stat. § 809.30(2)(b).

However, according to the Court of Appeals' order, Kyles's attorney has adamantly denied that Kyles ever requested that he file that document.

Since 2003, Kyles has argued to both state and federal courts that he was denied the right to counsel on appeal. Every court has rejected his claims, including the Court of Appeals, which denied the writ of habeas corpus now before the Supreme Court.

In the habeas petition at issue, Kyles asked the Court of Appeals to extend the time for him to file a notice of intent to pursue post-conviction relief, citing his attorney's previous alleged failure to do so. The Court of Appeals denied Kyles' request, holding that claims of ineffective assistance of post-conviction counsel must be brought in the trial court, not in a Knight petition in the Court of Appeals. (A Knight petition is a habeas petition, filed in the Court of Appeals, alleging ineffective assistance of appellate counsel. State v. Knight, 168 Wis. 2d 509, 484 N.W.2d 540 (1992).)

In his petition for review, Kyles argues that Wisconsin case law provides no clear answer as to how or where to attack a lawyer's failure to file a notice of intent to pursue post-conviction relief. Kyles argues that it makes no sense to force him to pursue relief in the trial court because the trial court has no authority to grant him the relief he needs – an extension of the time limit for filing a notice of intent to pursue post-conviction relief. *See* Wis. Stat. § 809.82(2)(a).

The state contends that the Court of Appeals' order is consistent with Wisconsin's general rule that ineffectiveness claims should be raised in the court where counsel was ineffective – here, in the trial court, where the notice of intent must be filed. The state maintains that even though a trial court has no ability to extend the notice of intent deadline (only the Court of Appeals may do so), a trial court, if persuaded by a defendant like Kyles, could vacate and reenter the judgment of conviction, giving the defendant a fresh 20 days to file a notice of intent.

WISCONSIN SUPREME COURT
THURSDAY, APRIL 3, 2014
1:30 p.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Racine County Circuit Court decision, Judge Faye M. Flancher, presiding.

2012AP393-CR

[State v. Toliver](#)

This case involves the appeal of a juvenile defendant who was convicted of first-degree reckless injury and attempted robbery with threat of force, both involving the use of a dangerous weapon.

The Supreme Court examines two issues:

- Which prevails: the general rule that a defect of subject matter jurisdiction may be raised at any time, or the convention that the Court of Appeals will not address an argument first raised in a reply brief?
- Where a Wisconsin court fails to make the specific probable cause finding required by Wis. Stat. § 970.032, does this failure cause the court to lose subject matter jurisdiction over the criminal proceeding, necessitating that the juvenile defendant be discharged?

Some background: In April 2009, 16-year-old Cortez Lorenzo Toliver was charged with attempted first-degree intentional homicide and possession of a dangerous weapon by a person under 18. The criminal complaint alleged that the victim had been shooting dice with Toliver and won most of Toliver's money. Toliver told the victim he needed the money back. The victim refused. Toliver produced a handgun and "racked the slide," which manually loads the chamber and cocks a semi-automatic pistol. The victim told Toliver he could have the money. The victim hesitated for a moment and tried to run away. Toliver shot the victim in the middle of the back, and then fled the scene. The victim was permanently paralyzed from the waist down as a result of the shooting.

On May 7, 2009, Toliver appeared in Racine County Circuit Court for a preliminary hearing. Instead of finding probable cause that Toliver had attempted to commit first-degree homicide, the specific crime charged, the circuit court said, "I would note, there is probable cause to believe a felony has been committed." (emphasis added). Nevertheless, the circuit court bound over Toliver, scheduled a pretrial conference, and returned Toliver to custody, having already set a \$50,000 bond.

Toliver subsequently filed a petition for reverse waiver accompanied by a motion to reopen the May 7 preliminary hearing. Toliver argued that the judge presiding on May 7 had failed to make the specific probable cause determination required by § 970.032(1) and that, as a result, the court lacked jurisdiction to proceed.

In November of 2009, following judicial rotation, a new judge held a hearing on Toliver's motion and reverse waiver petition. At the hearing, the new judge reviewed the transcript of the May 7 hearing and concluded that the first judge had found the requisite probable cause. Toliver's motion to reopen the preliminary hearing was denied, as was the petition for reverse waiver.

Toliver subsequently pled guilty to one count of first-degree reckless injury and one count of robbery with threat of force. On July 7, 2011, Toliver was sentenced to 27 years of initial confinement and 12 1/2 years of extended supervision.

Toliver filed a post-conviction motion for sentence relief, which was denied. He then appealed, arguing that the circuit court erroneously exercised its discretion in denying his request for reverse waiver and also erroneously exercised its discretion at sentencing. The Court of Appeals rejected Toliver's arguments regarding sentencing and reverse waiver.

The state argued that Toliver had waived his argument about the denial of the reverse waiver petition by entering a guilty plea. However, the state noted the general rule that a knowing, voluntary, and intelligent entry of a guilty plea waives all non-jurisdictional defects preceding the entry of a plea does not extend to defects of subject matter jurisdiction. The state also conceded that the circuit court, at the May 7, 2009 preliminary hearing, failed to make the finding required by § 970.032(1). The state said, nevertheless, using the record before it, the circuit court later expressly determined the court had previously found probable cause to believe Toliver had committed attempted first-degree intentional homicide. The state argues such a failure does not amount to a loss of jurisdiction.

The state argues that the defendant did not properly raise his issues in the Court of Appeals because it was not until his reply brief that he asserted the circuit court was without subject matter jurisdiction over the case. The state says the Court of Appeals appropriately applied the well-established rule that a party is not permitted to raise an argument for the first time on appeal.

Toliver argued that the defect identified in the state's brief meant that the circuit court had lost subject matter jurisdiction to proceed with the reverse waiver proceeding in the first place and that this was a defect of subject matter jurisdiction that had not been waived by the guilty plea. Toliver argued that § 970.320(1) and this court's decision in State v. Kleser, 2010 WI 88, 328 Wis. 2d 42, 786 N.W.2d 144 required the circuit court to discharge Toliver with further proceedings, if any, to be initiated in juvenile court.

He says the trial court's initial subject matter jurisdiction was limited to hearing and determining whether specific probable cause existed. He says when the circuit court did not make that specific finding at the preliminary hearing, subject matter jurisdiction was lost.

WISCONSIN SUPREME COURT
TUESDAY, APRIL 8, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), which reversed in part a Rock County Circuit Court decision, Judge James P. Daley, presiding.

2011AP1467-CR

[State v. Anderson](#)

This homicide case examines the discretionary power of the Court of Appeals to grant a new insanity phase trial on the ground that an allegedly harmless error in a jury instruction prevented the real controversy from being fully tried.

Some background: Donyil Leeiton Anderson, Sr. was charged with intentional first-degree homicide for the 2008 fatal stabbing of his former girlfriend, Stacey Hosey, and attempted first-degree intentional homicide for also attempting to stab to death Hosey's boyfriend, Brandon Beavers-Jackson. The crime was committed in the early morning hours of Aug. 9, 2008, in Hosey's home.

Anderson entered pleas of not guilty and not guilty by reason of mental disease or defect. At the guilt phase of Anderson's jury trial, the state presented uncontradicted evidence that shortly before 3 a.m. on Aug. 9, 2008, Anderson arrived at the residence he had previously shared with Hosey, with whom he had a one-year-old son. Upon his arrival, Anderson saw the car of Hosey's new boyfriend, Beavers-Jackson, parked outside. Anderson went to his own car and got his car stereo and used it to smash the windows of Beavers-Jackson's car. A neighbor saw Anderson kick in the back door of the house and enter. The neighbor called 911. She heard Hosey yell "get out," then heard screaming; she heard Hosey say, "I love you," and Anderson respond, "you lying bitch."

Anderson stabbed Hosey repeatedly. He then fought with and stabbed Beavers-Jackson. Anderson and Hosey's one-year-old son, who was present in the home, was not injured. Anderson then cut his own wrists. He was subdued at the scene by police after refusing orders to put down his knife.

Hosey died as a result of multiple knife wounds. Beavers-Jackson survived. Later in the hospital, Anderson told police he had been drinking before the incident, but was not intoxicated. He said that Hosey and Beavers-Jackson were taunting him, and he was in a jealous rage and just snapped. He also said that he had been taking a prescription drug, Strattera, for attention-deficit disorder that made him "real edgy."

Anderson was found guilty after entering an Alford plea, and the insanity phase trial was then tried to a jury. During the insanity phase of the trial, witnesses from each side provided conflicting testimony as to whether Anderson was suffering from a mental disorder under Wisconsin Stat. § 971.15(1) and to what extent prescription drugs, alcohol or depression may have affected Anderson.

Wisconsin Stat. § 971.15(1) provides: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law."

A jury instruction conference was held. The parties and the court discussed the extent to which a mental state caused by taking a prescription medication or a mental state caused by the voluntary taking of a prescription drug and alcohol constitutes a mental defect within the meaning of the insanity defense law.

The jury found Anderson did not meet his burden of proving he had a mental defect. Anderson appealed. He challenged the last sentence of the jury instruction:

“...A temporary mental state which is brought into existence by the voluntary taking of drugs or alcohol does not constitute a mental defect.”

The Court of Appeals first agreed that the instruction was flawed but also concluded that Anderson had forfeited his challenge because he did not make a sufficient particularized objection in the trial court. The state does not contest this finding.

The Court of Appeals then granted Anderson a new insanity phase trial in the interest of justice on the ground the erroneous instruction prevented the real controversy from being fully tried.

The state appealed to the Supreme Court. A decision could clarify what constitutes mental defect under a portion of Stat. § 971.15(1) and the discretionary power of the Court of Appeals to grant a new insanity trial.

WISCONSIN SUPREME COURT
TUESDAY, APRIL 8, 2014
10:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which affirmed a Milwaukee County Circuit Court decision, Judges Carl Ashley and Rebecca F. Dallet, presiding.

2012AP46-CR

[State v. Jenkins](#)

This criminal case looks at how circuit courts should factor in a witness's credibility when a defendant alleges ineffective assistance due to an attorney's failure to call that witness to testify. The Supreme Court is being asked to examine in such instances the interplay of the rule that juries are the ultimate arbiters of witness credibility and the prejudice standard for ineffective assistance, which requires post-conviction courts to assess whether the omitted evidence would undermine confidence in the trial's outcome.

Some background: There was a shooting on N. 38th Street in Milwaukee on March 23, 2007. A car driven by Anthony Weaver and Toy Kimber ran out of gas in the 2100 block of that street. They exited the vehicle and began talking to two girls, one of whom was Cera Jones. Although there was confusion in their various statements, it appears that Kimber bought \$10 worth of marijuana from Jones, who had to run into her house to retrieve it. While the four people were standing in or near the street, a car (described as a tan or brown Oldsmobile Cutlass) drove past, made a u-turn, and drove back toward the group. When the car stopped, a man exited the rear seat holding an AK-47 type rifle with a banana ammunition clip and a red laser sight. The man shot at both of the males, killing Weaver and injuring Kimber. The shooter apparently got back into the vehicle, and it drove away from the scene.

Kimber testified at trial that he immediately told police that Jimothy A. Jenkins was the shooter, although that was contrary to what was contained in the police report.

Jones told police at the scene that she did not know Kimber or Weaver, as well as that she could not see the shooter because it was dark, and the shooter was wearing a hoodie. About a week later, on April 1, Jones gave a description of the shooter, including that he had a clean-shaven baby face – a description not befitting Jenkins. Jones claims she also told police two days later that Jenkins was definitely not the shooter – information not contained in the police report.

Jenkins said he was sleeping when the shootings occurred; another witness gave conflicting information to police about Jenkins' whereabouts at the time.

Jenkins contends that while he was in jail awaiting trial, another man, Christopher Blunt, claimed responsibility for the shootings. Jenkins told his attorney that this comment was heard by another inmate, Corey Moore, but Jenkins' lawyer failed to subpoena Blunt or Moore to testify.

The jury found Jenkins guilty on three counts: one count of first-degree intentional homicide with use of a dangerous weapon, as party to the crime; one count of first-degree reckless injury with use of a dangerous weapon, as party to the crime; and one count of being a felon in possession of a firearm.

The court sentenced Jenkins on the homicide count to life in prison, with an eligibility date for extended supervision in 40 years. It imposed a consecutive sentence of seven years of

initial confinement and seven years of extended supervision on the reckless injury count. It imposed a concurrent sentence on the firearm possession count.

Jenkins' post-conviction counsel hired an investigator to interview Blunt, Moore and Jones. Blunt denied any knowledge of the shooting and denied knowing Jenkins; Moore and Jones provided statements to the investigator. Jenkins filed a post-conviction motion alleging that his trial counsel had provided ineffective assistance by not investigating, subpoenaing and examining Blunt, Moore, and Jones at trial. He sought a new trial.

The circuit court held an evidentiary hearing and denied the motion. It indicated that it could not reach a decision on whether the failure to call Jones to testify had been deficient performance because trial counsel had not provided any strategy concerning why she had not been called as a witness.

The circuit court concluded that failing to call Jones, Blunt and Moore did not constitute ineffective assistance of counsel because Blunt and Moore would not have testified about Blunt's alleged confession and Jones was not credible. Therefore, the defendant could not have suffered prejudice.

The Court of Appeals essentially agreed with the rulings and rationales of the circuit court. The Court of Appeals rejected Jenkins' argument that he should receive a new trial in the interest of justice because the jury was not given an opportunity to hear the testimony of Jones, Blunt and Moore. The Court of Appeals stated that a discretionary reversal due to the jury not hearing important evidence can occur only when the reason for not hearing the testimony was an erroneous evidentiary ruling by the trial court. See State v. Burns, 2011 WI 22, ¶45, 332 Wis. 2d 730, 798 N.W.2d 166. The Court of Appeals said that discretionary reversal was not an option in this case because the jury's inability to hear the testimony of Jones, Blunt and Moore was not due to an incorrect legal ruling by the trial court, but was due to the alleged ineffectiveness of counsel.

Jenkins argues that it is up to the jury, not the court, to determine whether the missing testimony should be credited. He contends testimony by Jones would have helped his case.

WISCONSIN SUPREME COURT
WEDNESDAY, APRIL 9, 2014
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), which reversed a Milwaukee County Circuit Court decision, Judge Rebecca F. Dallet, presiding.

2012AP2513-CR

[State v. Myrick](#)

This homicide case involves two defendants, one of whom testified against the other as part of what he contends was a plea agreement with prosecutors. The question before the Supreme Court is whether statements made by defendant Rapheal Lyfold Myrick during testimony at the preliminary examination stage of Justin Winston's case are then admissible in the case against Myrick himself.

Some background: Myrick and Winston were involved in the murder of Marquise Harris. The defendant admitted that he shot at Harris but claimed he missed him. He said Winston killed Harris by riddling him with bullets from an assault rifle. The state wanted the defendant's testimony against Winston and it sent a letter to defense counsel saying the state was "making the following offer of resolution based on Mr. Myrick being willing to cooperate in the prosecution of numerous cases involving Justin Winston." The terms of the offer are set forth at length at pages three and four of the Court of Appeals' decision.

As called for by the offer, the state debriefed the defendant, and the defendant testified at Winston's preliminary examination. The offer had provided that, "It will be at the discretion of said district attorney's office . . . as to whether the above negotiation will be conveyed to you to settle the [case] short of trial." After the defendant testified at Winston's preliminary examination, he stopped cooperating with the state after he was apparently disturbed by a newspaper article that he believed the state leaked and that he believed was false.

The trial court allowed the state to use Myrick's preliminary examination testimony in its case-in-chief. He was convicted of first-degree intentional homicide as a party to the crime. Myrick appealed, and the Court of Appeals reversed.

The Court of Appeals agreed with Myrick's argument that the trial court erroneously allowed the state to read to the jury as part of its case Myrick's preliminary examination testimony in the prosecution of Winston, the other defendant.

The Court of Appeals concluded this evidence was prohibited by Rule 904.10, which reads:

"Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to the court or prosecuting attorney to plead guilty or no contest to the crime charged or any other crime, or in civil forfeiture actions, is not admissible in any civil or criminal proceeding against the person who made the plea or offer or one liable for the person's conduct. Evidence of statements made in court or to the prosecuting attorney in connection with any of the foregoing pleas or offers is not admissible."

The Court of Appeals said what was at issue on appeal was whether the defendant's preliminary examination testimony was "in connection" with his offer to the prosecutor rather than merely an offer the prosecutor made to him. It said the case also presented the question

whether, under Wisconsin case law, the defendant's preliminary examination testimony was protected by Rule 904.10.

The Court of Appeals concluded that a fair and complete reading of the state's proffer letter showed that the defendant in fact made an offer to the prosecuting attorney to plead guilty as required by Rule 904.10.

The court reasoned the state was prepared to offer the defendant a significantly reduced charge and lenient sentencing recommendation provided that the defendant complied with what the letter required. The Court of Appeals said it was unreasonable to suggest that the reduced charge and more lenient sentencing recommendation was not part of the defendant's reciprocal offer to the state. The court said the only way the defendant could get the offered sentencing recommendation was to plead guilty or no contest and thus the defendant's offer to the prosecuting attorney was implicit in the prosecutor's letter.

The specific issue raised in the state's petition for review is: Did the Court of Appeals act in excess of its jurisdiction and usurp the exclusive authority of the Supreme Court by effectively amending a statutory rule of evidence to make it applicable in a situation expressly excluded by the Supreme Court when it promulgated the rule?

WISCONSIN SUPREME COURT
WEDNESDAY, APRIL 9, 2014
10:45 a.m.

The Wisconsin Supreme Court is responsible for supervising the practice of law in the state and protecting the public from misconduct by lawyers. Lawyers must follow a code of ethics developed by the Court. When there is an allegation that a lawyer has acted unethically, the Supreme Court's Office of Lawyer Regulation (OLR) investigates, and, if warranted, prosecutes the attorney. A referee - a court-appointed attorney or reserve judge - hears the discipline cases and makes recommendations to the Supreme Court. The lawyer involved in this case has a practice in New London, Wis.

2012AP1949-D

Office of Lawyer Regulation v. Trewin

In this attorney disciplinary proceeding, Atty. Michael G. Trewin appeals from the report and recommendation of the referee, who concluded that Attorney Trewin had committed 14 of the 15 counts of professional misconduct alleged in the disciplinary complaint and recommended the revocation of Attorney Trewin's license to practice law in Wisconsin.

Some background: Attorney Trewin was admitted to the practice of law in this state in 1985. He currently maintains a law practice in New London.

Attorney Trewin has been the subject of professional discipline on two prior occasions. In 2004, the supreme court suspended his law license for five months for misconduct that included entering into lender-debtor relationships with multiple clients without obtaining written, informed conflict waivers; failing to advise those clients of the possible adverse consequences resulting from a lender-debtor relationship; engaging in dishonesty or misrepresentation with his clients; and failing to file timely income tax returns.

In re Disciplinary Proceedings Against Trewin, 2004 WI 116, 275 Wis. 2d 116, 684 N.W.2d 121. In 2006, Attorney Trewin was publicly reprimanded with his consent for professional misconduct that included failing to notify courts and opposing counsel of his 2004 suspension, failing to list all of his pending matters on a post-suspension affidavit provided to the Office of Lawyer Regulation (OLR), and engaging in a prohibited conflict of interest by representing clients in a bankruptcy matter whose interests were adverse to the interests of another client. Public Reprimand of Michael G. Trewin, No. 2006-6.

The complaint in the present disciplinary case alleged 15 counts of misconduct arising out of Attorney Trewin's personal business transactions with three client couples. After a contested evidentiary hearing, the referee found that Attorney Trewin had engaged in misconduct in his business dealings with each couple.

The referee found that Attorney Trewin had followed a similar pattern of conduct in each situation. He was originally retained by the couple when they were facing legal problems regarding their debts, either in the context of a foreclosure proceeding or a possible bankruptcy. Because of the couple's financial problems, they had difficulty obtaining loans in traditional credit markets—i.e., from banks, credit unions, etc.

Trewin loaned the couples money, starting with relatively small amounts and increasing the amount of the loans over time as the couples needed additional funds. The referee further found that because Trewin was not constrained by standard banking regulations, the clients did not receive many of the pieces of information and warnings that they would have when

borrowing from traditional lenders. Moreover, there were many errors in the documentation of the loans and the tracking of payments.

Ultimately, when the couples had difficulties making their payments to Trewin, he would have the couple deed their property over to him with the promise that they could reacquire the property from Trewin if they were current on their payments to him and could also pay a specified amount for their property. The couples, however, who were generally unsophisticated in financial matters, were not in a financial condition where they could ever regain ownership of their property.

The referee concluded that Trewin's actions concerning these business dealings with his clients violated a number of the Rules of Professional Conduct. For example, the referee determined that Trewin had continued to provide legal representation to the couples despite the conflict of interest he had because of his personal interest in his business transactions with them. He also found that Trewin had failed to fully disclose the terms of the various transactions so that his clients could reasonably understand. The referee further concluded that on multiple occasions and in various ways Trewin engaged in conduct involving fraud, dishonesty, deceit or misrepresentation in his business transactions with his clients. With respect to two of the couples, the referee determined that Trewin had interfered with the OLR's investigation by attempting to persuade the couples to cease cooperating with the OLR. On the other hand, the referee concluded that the OLR had failed to prove one count regarding alleged misrepresentations by Attorney Trewin in the course of the OLR's investigation.

In light of the nature of the misconduct here and the presence of prior discipline for similar violations, the referee concluded that Trewin was unfit to practice law in this state and therefore recommended the revocation of his license.

On appeal, Trewin has challenged the referee's conclusions that he violated a number of Rules of Professional Conduct for Attorneys. He contends that it was proper for him to enter into loan transactions with his clients because their credit histories and financial situations prevented them from obtaining needed funds from traditional lenders. He contends that he provided sufficient information for the clients to understand the proposed transactions with him and that after the commencement of the disciplinary proceeding that resulted in the 2004 suspension, he always obtained written conflict waivers from his clients. Indeed, he states that one of the couples was represented by an independent attorney when they sold their property to him. He asks the court to reverse the legal conclusions of ethical violations found by the referee. If the court does affirm some of the violations, Trewin argues that the referee's recommended discipline would be excessive and that an appropriate level of discipline would be a suspension of no more than three to six months.

The OLR urges the court to affirm the referee's report and recommendation in all respects.

The supreme court is expected to consider whether the referee's findings in support of the rule violations are adequately supported by the evidence. If the court affirms some or all of those violations, it will then determine the appropriate level of discipline to be imposed.